MAMAT DAUD & ORS.

v.

THE GOVERNMENT OF MALAYSIA

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
[CIVIL APPLICATION NO. 26 OF 1985]
14 FEBRUARY 1986

CONSTITUTIONAL LAW: *Article 4(4) of Federal Constitution - Section 298 A of Penal Code - Whether ultra vires Article 74(1) of Federal Constitution - Legislative competence of Parliament.*

CIVIL PROCEDURE: *Application for leave under Article 4(4) of the Federal Constitution - Prerequisites for leave to be granted - Arguable case and not frivolous.*

The 1st, 2nd and 3rd applicants were charged and found guilty under the new s. 298A of the Penal Code by the Magistrate's Court at Hulu Trengganu in connection with their divisive activities amongst Muslims as unauthorised "Bilal", "Khatib" and "Imam" respectively during a Friday prayer held on 13 May 1983 at Kampung Kenanga, Wakaf Tapai, Ajil.

The applicants contend that the penal offences introduced by the new s. 298A of the Penal Code is *ultra vires* Article 74(1) as being in excess of the legislative power of Parliament. Their argument is that except for legislation enacted under Article 76(1), it is for the legislature of a State and not Parliament to make law in the nature of s. 298A for the purpose of peaceful and harmonious practice of the religion of Islam. Counsel for the respondent contends however that s. 298A is enacted within the legislative competence of Parliament since it is covered by item 4(h) of the Federal List which confers Parliament with the power to make law pertaining to civil and criminal law and procedure including creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law. The applicants applied for leave under Article 4(4) to challenge the validity of s. 298A.

Held:

[1] For the applicants to succeed, they must satisfy the Court firstly that leave is necessary and secondly that they have an arguable case in that the application is not frivolous.

[2] In this case, the validity of the legislation is to be challenged on the ground that it deals with a matter with respect to which Parliament has no power to make law. As such, leave of the Court is required under Article 4(4) - see *East Union (Malaya) Sdn. Bhd. v. Government of the State of Johor and Government of Malaysia* [1981] 1 MLJ 151 and *Ramasamy a/1 Shanmugam v. State Government of Penang and Government of Malaysia* SCC Appln. No. 17/1985.

[3] Taking into account the facts and circumstances of the case, the Court took the view that the present application was not frivolous and that the applicants should be allowed to canvass their case before the full Court on the constitutionality and validity of the new section introduced.

Cases referred to:

East Union (Malaya) Sdn. Bhd. v. Government of the State of Johor and Government of Malaysia [1981] 1 MLJ 151

Ramasamy a/l Shanmugam v. State Government of Penang and Government of Malaysia SCC Appln. No. 17/1985

Legislation referred to:
Federal Constitution, arts. 3(1), 4(4), 74(1), 76(1), 77
Penal Code, s. 298A

For the applicants - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the respondent - T. Selventhiranathan; SFC

JUDGMENT

Mohd. Azmi SCJ:

When I granted the applicants leave under Article 4(4) of the Federal Constitution, I indicated that I would give my reasons for allowing the notice of motion. I now proceed to do so.

The issue in this case is whether the penal offences introduced by the new s. 298A of the Penal Code by the Penal Code and Criminal Procedure Code (Amendment) Act 1983 (Act A549) is *ultra vires* Article 74(1) as being in excess of the legislative power of Parliament. *Inter alia*, the new section makes it a penal offence for any person to cause disharmony, disunity or feelings of enmity, hatred or ill-will, on grounds of religion, between persons or groups of persons professing the same or different religions. The offence is punishable with imprisonment for a term which may extend to three years, and if committed in the proximity of any place of worship or in any assembly engaged in the performance of religious worship or religious ceremony the imprisonment term may extend to five years. It is common ground that the word "religion" in the new section is intended by Parliament to cover all religions including Islam. Mr. Sri Ram, Counsel for the applicants submits that by virtue of Article 74 and item (1) of the State List in the Ninth Schedule to the Federal Constitution, Parliament has no legislative competence to enact the new section to cover the religion of Islam because it has *inter alia* no power to legislate either law to cover Islamic law, or law relating to personal and family law of persons professing the religion of Islam; and nor has Parliament any power to enact law with respect to mosques or any public places of worship; creation and punishment of offences of persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List. It is further submitted that actually Parliament has no power at all to enact law on any religion or to create penal offences on ground of any religion. The power to enact such matters is reserved by Article 77 for the legislature of a state under residual power of legislation except for those aspects of Islam which are already listed in the State List. For the respondent however, Mr. T. Selventhiranathan argues that Act A549 is enacted within the legislative competence of Parliament since it is covered by item 4(h) of the Federal List which confers Parliament with the power to make law pertaining to civil and criminal law and procedure including creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law.

For the applicants to succeed, they must satisfy the Court firstly that leave is necessary under Article 4(4) and secondly, that they have an arguable case in that the application is not frivolous. In this particular motion, not only is the impugned law a post-Merdeka legislation but also the intended challenge is on the competency of Parliament to enact the legislation and it is not merely grounded on the impugned law being inconsistent with the Constitution. In other words, the validity of the legislation is to be challenged on the ground that it deals with a matter with respect to which Parliament has no power to make law. As such leave of the Court is required under Article 4(4) (See *East Union (Malaya) Sdn. Bhd. v. Government*

of the State of Johor and Government of Malaysia [1981] 1 MLJ 151; and *Ramasamy a/l Shanmugam v. State Government of Penang and Government of Malaysia* SCC Appln. No. 17/1985).

On the second requirement, the first, second and third applicants were charged and found guilty under the new s. 298A of the impugned legislation by the Magistrate's Court at Hulu Trengganu in connection with their divisive activities amongst Muslims as unauthorised "Bilal", "Khatib" and "Imam" respectively during a Friday prayer held on 13 May 1983 at Kampung Kenanga, Wakaf Tapai, Ajil. Article 3(1) provides that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. Mr. Selventhiranathan contends that the constitutional right of citizens to practise their religions in peace and harmony equally applies to persons professing the Islamic religion. The applicant do not seem to disagree with this proposition but they claim that except for legislation enacted under Article 76(1) it is for the legislature of a state and not Parliament to make law in the nature of s. 298A for the purpose of peaceful and harmonious practice of the religion of Islam. In the circumstances I am of the view that the present application is not frivolous and the applicants should be allowed to canvass their case before the full Court on the constitutionality and validity of the new section introduced by Act A549.

Also found at [1986] 2 CLJ 118